DISCOVERY IN MASSACHUSETTS.

PART I.

THE object of this article is to present a general view of the process of discovery in Massachusetts and of its possibilities for practical usefulness, and to place in proper perspective the peculiarities of the statutes and decisions on the subject. The attitude hitherto of the Massachusetts bar toward the system has been such that in 1898, in Gunn *v.* N. Y., N. H., & H. R. R.,[1] the court felt called upon to suggest to the bar that "there can be no doubt, we think, of its utility when properly administered." As this remark and the comparative scarcity of reported cases indicate, the practice of seeking discovery has not been so common as one might have expected in view of the opportunities offered by the statutes.[2] It is probably a common opinion among Massa-

---

[1] 171 Mass. 417, at p. 421.

[2] Revised Laws of Massachusetts (1902), c. 173, §§ 57–67, 88:

SECTION 57. The plaintiff, after the entry of the action, and the defendant, after answer, or in a real or mixed action, after plea, and before the opening of the trial on the merits, may file in the clerk's office . . . interrogatories to the adverse party for the discovery of facts and documents material to the support or defence of the action.

SECTION 58 provides for an affidavit that there is reason to believe that the interrogating party will derive some material benefit from the discovery.

SECTION 59. Interrogatories shall be answered, and the answers shall be filed in the clerk's office, within ten days after notice of the filing thereof has been given to the party interrogated or to his attorney, unless, upon cause shown either before or after the expiration of said ten days, further time is allowed by the court. . . .

SECTION 60. Each interrogatory shall be answered separately and fully. The answers shall be in writing, under oath, and shall be signed by the party interrogated, who may introduce into his answer any matter relevant to the issue to which the interrogatory relates.

SECTION 61. If a corporation is a party to an action, the adverse party may examine the president, treasurer, clerk, or a director, manager or superintendent or other officer thereof, as if he were a party.

SECTION 62. If a document, book, voucher or other writing called for by an interrogatory contains matters not pertinent to the subject of the action, the answer may state such fact, and that such part has been sealed up or otherwise protected from examination; and thereupon such part shall not be inspected by the interrogating party, but he may apply to the court and obtain an order to inspect the part so protected from examination, or so much thereof as the court, upon a hearing, or if necessary, by its own inspection, shall find to have been improperly withheld and concealed.

chusetts lawyers that the filing of interrogatories before trial is, in the absence of special circumstances, either a waste of time and labor or inexpedient because of the danger of warning an opponent by asking him questions. Some lawyers, however, often file interrogatories, and as the use of statutory interrogatories is increasing, some discussion of the subject may be of service to the bar as well as of general interest.

The history of the process of discovery in the English courts[1] shows an accumulation of inconsistent precedents. A careful reconsideration by the Massachusetts courts of some of their earlier decisions and *dicta* will be necessary to develop the system along definite lines, and to avoid the confusion and the results of confusion presented by the English books and precedents.

Statutory discovery in Massachusetts dates back to the Practice Act of 1851. Before that time there were limited rights to discovery in equity, but there were only eight or ten reported cases, and bills for discovery were characterized by the commissioners who drafted the Practice Act as "expensive, dilatory, hampered by many technical rules, and from these and other causes, . . . in our practice as nearly useless as any remedy can well be." In 1849

SECTION 63. The party interrogated shall not be obliged to answer a question or produce a document if it would tend to criminate him, or to disclose his title to any property the title whereof is not material to the trial of the action in the course of which he is interrogated, or to disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his own case.

SECTION 64. If an answer contains irrelevant matter, or if it is not full and clear, or if an interrogatory is not answered, and the party interrogated refuses to expunge or amend, or to answer a particular interrogatory, the court or a justice thereof may, upon motion, order such irrelevant matter to be expunged, or such imperfect answer to be made full and clear, or such interrogatory to be answered, within such time as it may order.

SECTION 65 provides for costs as the court may direct.

SECTION 66. If a party neglects or refuses to expunge, amend or answer according to the requirements of this chapter, the court may enter a nonsuit or default.

SECTION 67. If the court finds that due diligence has been used, it may allow interrogatories, with an affidavit stating the reason why they were not filed earlier, to be filed during the trial of an action. They shall be answered forthwith or with as little delay as practicable, and the court may suspend the trial for the purpose of having them answered.

SECTION 88. The answer of a party to interrogatories filed may be read by the other party as evidence at the trial. The party interrogated may require that the whole of the answers upon any one subject-matter inquired of shall be read, if a part of them is read; but if no part is read, the party interrogated shall in no way avail himself of his examination or of the fact that he has been examined.

[1] See 11 HARV. L. REV. pp. 137 and 205; 12 Ibid. 151; and Bray on Discovery, *passim*.

a commission was appointed, with Benjamin R. Curtis[1] as its chairman, to revise Court Proceedings; and after careful inquiry among the members of the profession, they submitted an interesting report, and a draft act which with few changes was enacted as Chapter 233 of the Acts of 1851.[2] The present Practice Act[3] is in outline and in many of its details the same as the draft submitted by the commissioners. In their report they introduced the interrogatory statutes by a discussion of the proposal to allow parties to take the stand. Having dismissed that question by saying that they did not think it for the interests of justice or of the public morals that parties should testify, they proceeded as follows:

"Nevertheless, it does not seldom happen that facts are known to parties alone, or that the means of proof are expensive and difficult to be had, or that the facts are not susceptible of denial, and no proof ought to be required; and in these cases it is clear there should be some means of compelling the parties to answer. This is now done by a bill of discovery filed on the equity side of the court; but this is a slow, expensive, and we think the experience of the profession will justify us in saying, almost a useless remedy.

"We propose to substitute for this a right to file interrogatories in writing touching any matter pertinent to the suit, which the party to whom they are addressed must answer on oath or affirmation. This has long been practised in courts of admiralty, and was introduced into the courts of Virginia some time since, and more recently into those of some other states. We believe it will be an extremely useful instrument, and will attain most of the benefits, without the evils of examining parties as witnesses on the stand."[4]

The Statute of 1856[5] allowing parties to testify removed one of the reasons specified by the commissioners for the introduction of the system of statutory discovery, but the system remains and has been extended to the courts of equity and probate.[6] The reason

[1] Later Associate Justice of the Supreme Court of the United States. The other commissioners were Reuben A. Chapman, later Chief Justice of Massachusetts, and Nathaniel J. Lord, said to have been the leader of the Essex County bar at that time.

[2] The full text of the report, the draft act with notes, and the act as passed, are reprinted in Hall's Mass. Practice (1851). The act was revised in 1852. See St. 1852, c. 312.

[3] R. L., c. 173.

[4] Hall, Mass. Practice, p. 156.

[5] St. 1856, c. 188.

[6] The provisions for statutory interrogatories were extended to equity cases in 1855 (see St. 1855, c. 194, and St. 1862, c. 40, and R. L. c. 159, §§ 15, 16) after a report on equity practice by the same commission (Mass. Senate Doc. No. 67 of 1853), and to probate cases in 1879 (St. 1879, c. 186, R. L. c. 162, §§ 41, 42).

for its present existence and development is to be found in the fundamental principles of procedure.

The right to get discovery, or more properly the duty to give discovery,[1] exists as a part of a rational system of procedure to supplement pleading by defining issues and facilitating proof in order to expedite the trial. As a condition of administering justice to those who seek protection in its courts, the community imposes upon each litigant a duty to answer reasonable questions under the penalties of perjury, in order to eliminate undisputed matters and assist the court by affording the other party opportunity to present his case fairly and clearly. As Lord Redesdale expressed it, "the object of the court in compelling a discovery is either to enable itself or some other court to decide on matters in dispute between the parties."[2] The duty to give discovery, therefore, appears to be primarily a duty to the court, and although the system results in giving the parties absolute rights, yet, in criticising the system, the point of view of the court should be constantly kept in mind.

The Massachusetts courts are practically free to develop the statutory system in such manner as they think reason and efficiency demand, because the statutes provide a new system which is not necessarily governed by the rules of the English Chancery.[3] Furthermore, the courts are given very broad powers to regulate all procedure by rules of court,[4] without waiting for the legislature to act. As the use of the system of discovery increases, this power may be of great importance, and the doctrine of *stare decisis* does not seem to stand in the way of its exercise, because the law of discovery, being a part of administrative law which does not directly affect substantive rights, must develop as the business of the courts increases.

THE SCOPE OF THE RIGHT TO DISCOVERY — "FISHING."

Courts commonly profess to a rule against "fishing," but this rule is vague and of little value, because the object of filing every interrogatory is to fish, if the word is used in a broad sense. The question is, therefore, "To what extent should fishing be allowed, and to what extent is it allowed?" The Massachusetts authorities

[1] *Cf.* 12 HARV. L. REV. 152.
[2] Mitford, Pleading, Pl. 191.
[3] See Gunn *v.* N. Y., N. H., & H. R. R., 171 Mass. 417, at p. 420.
[4] R. L., c. 158, § 3.

seem to allow more fishing in equity cases than in cases under the statutes.

Shortly before the appointment of the revision commission, already mentioned, in the case of Adams *v.* Porter,[1] discovery was sought in equity in aid of an action at law. The defendant, citing English authority, objected that the bill pried into the defendant's case. On this point, Dewey, J., without discussing the details of the bill, said:

"Assuming the English rule to be what it is supposed to be by the defendant, yet it is not applicable in this Commonwealth. Our whole system of inquiry, by the instrumentality of a legal proceeding, has been that of full inquiry as to any and all facts that may impeach the right of property in the party of whom the inquiry is made."

The facts of the case do not seem to have required this broad statement. It has not since been discussed, and it may be that it would not be approved to-day even in equity. It has not, however, been contradicted.[2]

It was with the opinion of Judge Dewey fresh in their minds that the commissioners drafted the provisions for interrogatories. The statute passed on their recommendation gave parties a right to interrogate "for the discovery of facts and documents material to the support or defence of the suit." The first important opinion on the scope of discovery under this statute was that in Wilson *v.* Webber,[3] decided in 1854, three years after the Practice Act went into effect. The facts were as follows: the defendant in tort for breaking and entering plaintiff's close answered soil and freehold in himself, and filed the following interrogatory to the plaintiff:

"Please set forth in detail the title which you have, or claim to have, to the close described in your declaration. If you purchased it, state of whom you purchased it. If you acquired title in any other way, state particularly and in detail how you acquired title. Annex to your answer copies of all deeds or other instruments under which you claim to derive any title."

The court held that it need not be answered, and Bigelow, J.,[4] in speaking of Section 61 of Chapter 312 of the Acts of 1852 (now R. L., c. 173, § 57), said:

"Let us suppose a case where a plaintiff brings an action of contract for goods sold and delivered; the defendant, in his answer, denies the sale and

[1] 1 Cush. (Mass.) 170.
[2] See Haskell *v.* Haskell, 3 Cush. (Mass.) 540.
[3] 2 Gray (Mass.), 558.
[4] Later he became Chief Justice.

delivery, or alleges his ignorance thereof, and requires proof of those facts by the plaintiff, and also sets up the defence of release, or accord and satisfaction. In such a case, the plaintiff could not ask the defendant to disclose any facts or documents tending to prove the release, or accord and satisfaction, because they would not be, strictly speaking, in support of the plaintiff's case; but he might interrogate him concerning the sale and delivery of the property, that being the case which the plaintiff is bound to prove. On the other hand, the defendant might require of the plaintiff a disclosure of facts tending to establish the release, or the accord and satisfaction, because they would directly tend to support the defence; but he could not inquire concerning the proof of the sale and delivery of the property to himself. . . .

"If there were any doubt as to the true construction of Section 61 of the statute, by which the right to interrogate is given, it is made entirely clear by Section 69,[1] which imposes a restriction on the right. It is there provided that the party interrogated shall not be required to 'disclose the names of the witnesses by whom, or the manner in which, he proposes to prove his case.' This provision is entirely inconsistent with the theory that by Section 61 a right was given to a party to seek by interrogatories a disclosure of the case that was to be set up against him; because such a right could not be exercised to any effective purpose under such a restriction as is imposed by Section 69. It is difficult to imagine a question relative to material facts in support of a case against a party the answer to which would not necessarily involve a disclosure of the mode of its proof. Take the case already supposed; a defendant could not well ask material questions concerning the time, place, or circumstances of the sale and delivery of goods, which would not require the plaintiff to disclose, in some degree, the proof on which he might rely to sustain his case; and so, on the other hand, the plaintiff could not inquire into material facts tending to establish a release, or accord and satisfaction, without compelling the defendant to develop some part of the case which he must prove in order to sustain his defence. It is very clear, therefore, that this restriction is inconsistent with a right to interrogate a party concerning the proofs of his own case; and was intended to restrain the right to require a disclosure, *to matters in aid of a case to be established*[2] against the party interrogated."

The doctrine of this opinion[3] appears to be very different from that of Adams *v.* Porter, and it is noticeable that although the English equity practice was referred to by Judge Bigelow in Wilson *v.* Webber, yet he did not mention Adams *v.* Porter or the doctrine therein stated as the general doctrine of Massachusetts.

---

[1] Now R. L., c. 173, § 63.

[2] The italics are the writer's.

[3] *Cf.* Davis *v.* Mills, 163 Mass. 481.

Tested by the standard of reasonableness, the decision in Wilson *v.* Webber was unquestionably correct. But it may well be doubted whether the learned judge would have expressed himself in such general terms if the interrogatory before him had been properly drawn. As it is, the general remarks are likely to be used in support of the proposition, that the party's right to interrogate depends upon the appearance of an affirmative case in his pleadings, and that interrogatories under a negative plea for the purpose of defeating the affirmative case of the other party are not authorized. There appears to be a more or less common impression that this is the law; but it is submitted that such a proposition puts a construction upon the statutes which the language does not require, which is opposed to the principles of discovery and to the intention of those who passed the statutes, and which is unfair to the negative pleader.

Taking the illustration, used by Judge Bigelow, of a suit for goods sold and delivered, in which the defendant denies the sale and delivery and sets up a release, let us suppose that under the general negative plea the defendant proposes to show that, although the goods were delivered to him, credit was given to a third person; and suppose the plaintiff, on the issue of the release, proposes to show that the release was snatched from him and never given. From the point of view of pleading and the burden of establishing, both the plaintiff and the defendant would have an affirmative and a negative case, and if the language quoted from the opinion of Judge Bigelow is taken literally, each could interrogate as to his affirmative case, but neither could interrogate in support of his negative case, although the facts to be proved under it were affirmative. The arbitrary and unreasonable character of a system which would produce such results seems a sufficient answer to the claim that such a system was intended by the legislature, and in the leading case of Baker *v.* Carpenter[1] the court decided that a defendant who had specified in his answer facts which might have been shown under a general denial in "disproof" of his opponent's case, might interrogate in support of his answer.

The relation of each party to the facts in a case was clearly stated in the recent case of Robbins *v.* Brockton, etc., Ry.,[2] by Chief Justice Holmes when he said:

---

[1] 127 Mass. 226.

[2] 61 N. E. Rep. 265.

"The facts are a part of the plaintiff's case none the less that the defendant's case may consist in pressing a different view as to what the facts were."

This shows that the case of a party is his view of the facts. Whether or not the facts support his case cannot be known until the court or jury find the facts, but it is in order that he may support his view of what happened that he has a right to interrogate. It is clearly immaterial whether his view is expressed in a declaration or in a general denial, or whether the answers sought may contain evidence material to the support of both views.

The test of the right to discovery is also distinct from the test of admissibility at the trial, as no court can decide on the competency of evidence until it is offered at the trial. The reasonable rule appropriate to the system seems to be that in order to interrogate, the interrogating party must disclose his own case either in his pleadings or in his question sufficiently to show the court that he is not "merely fishing," and that the answers sought may reasonably be legitimately useful in preparing to support his view of the facts as indicated in his specifications. The present rules of pleading do not require specifications as to many matters, but the right to interrogate does require specifications, and it is reasonable that it should. Such specifications for discovery, it would seem, may be either in the form of pleadings, or in the form of questions which may be answered by "yes" or "no," or in the form of an offer of proof introducing interrogatories which support it.

If, in Wilson *v.* Webber above cited, the defendant had asked, "Have you not in your possession or control a paper purporting to be a lease to you from A. B. of the premises in question endorsed 'This lease is hereby surrendered by mutual consent' or with some similar words? if yea, give discovery thereof;" it is submitted that he would have been entitled to an answer.

DISCOVERY OF THE NAMES OF WITNESSES.

The statute providing that a party shall not be required to "disclose the names of the witnesses by whom, or the manner in which he proposes to prove his case" raises the question whether a party can interrogate as to the names of persons likely to know about a case.

In a case of tort for damage from negligent driving of the

defendant's teamster, the Superior Court has refused to order the disclosure of the name and address of the teamster on a statement of intention by the defendant that he intended to call him at the trial. This is probably the ordinary practice of judges in this matter; but it is submitted that such practice goes beyond the provisions of the statute and defeats the object of the other sections.

It may be said that there is a reason of public policy based on the fear of encouraging perjury and subornation of perjury by giving an opportunity to tamper with witnesses; and formerly this would have been regarded as a strong argument, because public policy favored secrecy, and not only excluded parties as witnesses, but in equity cases required all testimony to be taken secretly. Such rules have been abolished, however, and public policy does not seem to furnish a sufficient reason for drawing an arbitrary line in the law of discovery. The arbitrary character of the line drawn by the ruling above referred to appears forcibly in the opinion of Lord Langdale in Storey *v.* Lennox,[1] a case in which he discussed the production of certain letters as follows:

"The defence is that the letters may disclose the names of the witnesses and the evidence, and so indeed may every discovery which the defendant may be required to give. In telling the truth, as he is bound to do, he may incidentally disclose to the plaintiff that which may enable the plaintiff to learn the names of the witnesses and the nature of the evidence: and if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of courts of equity would be lost. It occurs constantly to ask the defendant when, where, and in whose presence particular transactions took place, and he cannot protect himself by saying that to tell in whose presence the transactions took place would disclose the names of his witnesses." [2]

A question calling upon a party to state the name and address of a teamster who drove a team on a certain occasion does not ask for a statement that the party is going to call him, or for a statement of what he knows or how the party interrogated expects to use him. Here again the form of the question is important, and it is submitted that the statute is limited to protection against "merely fishing" questions such as: "Who knows about the case, and what do you propose to do?" — questions of which the interrogatory above quoted from Wilson *v.* Webber is a good illustra-

[1] 1 Keen, 341, at p. 357.

[2] *Cf.* interrogatories in Todd *v.* Bishop, 136 Mass. at p. 388.

tion. The function of a court is not to protect a party from evidence of a just claim, and the disclosure, in answer to specific questions, of the names and addresses of persons actually concerned either as participants in, or observers of, an action inquired into, is a most important requirement in the system of discovery, the primary object of which is to enable a party to prepare for trial. A document is not protected because it may contain evidence for both parties and because the party interrogated may intend to use it in evidence,[1] and what logical or practical reason is there for distinguishing between a document which may contain evidence relevant to the issues in a case and an individual who may contain evidence relevant to the issues in a case?

If a party is to be allowed to withhold the names of persons on the ground that they are his witnesses, he should certainly be required to state that ground in his answer under oath and to produce the persons at the trial. Otherwise he is given the benefit of the statute without complying with it.

THE DISCOVERY OF THE UNOFFICIAL KNOWLEDGE OF CORPORATE OFFICERS.

The present statute[2] provides that

"If a corporation is a party to an action the adverse party may examine the president, treasurer, clerk or a director, manager, or superintendent or other officer thereof, as if he were a party."

Under a statute substantially similar to this arose the case of Hancock *v.* Franklin Ins. Co.,[3] in which plaintiff interrogated the president of the defendant corporation. The court held that the interrogatories need not be answered since they did not appear to call for any official information, and apparently inquired as to his personal knowledge of such facts as he could only state as a witness on the stand or in a deposition.

This reasoning seems questionable. It was not fully discussed in the opinion; it does not appear to have been fully argued, and it puts a limit on statutory discovery from corporations which is not required by the statute. In Wright *v.* Dame[4] the court allowed

---

[1] See Wilson *v.* Webber, 2 Gray (Mass.) at p. 561; and see Bray on Discovery, 183 ff. See Peck *v.* Ashley, 12 Metc. (Mass.) 478.

[2] R. L., c. 173, § 61.

[3] 107 Mass. 113.

[4] 1 Metc. (Mass.) 237.

a mere corporator who held no office to be made a party to a bill in equity for relief merely for the purpose of obtaining discovery from him. The court based its opinion expressly on the ground that, although the answers could not be read in evidence against the corporation, they might be of great assistance in preparing for trial, since the individuals who were not officers might be those only who knew the facts sought to be discovered.

To the objection that the corporator could be examined as a witness, the court replied that the examination of the corporator as a party was obviously much more beneficial than an examination of him as a witness.

The court in 1840, therefore, did not regard the right to discovery from a corporation as limited either by law or policy to the searching of the corporation's official conscience, but thought it fair that a party should have the assistance of the actual knowledge of those interested in the concern. The statute above quoted allows interrogatories to be put only to officers of a company; but there is nothing in the statutes limiting the scope of discovery in the manner stated in the opinion in Hancock *v.* Franklin Ins. Co. above cited. On the contrary, the presumption seems to be that, as the case of Wright *v.* Dame must have been considered by the commissioners on the Practice Act of 1851, they intended to limit only the number of persons who might be interrogated, and that, if they had intended to limit the matter which might be inquired into, they would have said so. This view is strengthened by the wording of the statute, which says that a party may examine the officer of a corporation "as if he were a party." It seems quite probable that this language was taken directly from the opinion in Wright *v.* Dame.

As will appear later, the corporate officer must make reasonable search among the agents and other sources of information which are at the service of the company. It is surely the duty of a corporate officer to give the corporation in the management of its affairs the benefit of such knowledge of facts as he can disclose without breach of confidence to others, even if he acquired the knowledge before he was connected with the corporation; and it seems most illogical, therefore, to hold that an officer must inquire of others, but not of himself, although he has material information which is at the service of the corporation. In other words, the "personal knowledge" of the officer in Hancock *v.* Franklin Ins.

Co. was "official information," and therefore a proper subject for discovery under the court's own test.[1]

The policy, for which the case of Wright *v.* Dame stands, of allowing discovery of the actual as well as the official knowledge of the representatives of a corporation, seems a sound one. The corporation is not charged with the personal knowledge of its officer merely because he answers interrogatories; his personal knowledge is sought not as a basis of suit, but as an aid to the preparation of proof; and the question of policy is, "Shall he be allowed to decide whether some inconvenient question calls for his personal or his official information?" It is submitted that he should be obliged to answer as to both. After he has answered, questions of evidence or of substantive law may arise as to the extent to which his statement may be used to prove, or his knowledge may create, a liability of the body of which he is a representative; but such questions are distinct from the question of the duty to make discovery, which is primarily a duty to the court. Whatever may be thought of these views of policy, the case of Wright *v.* Dame is law to-day for equity cases,[2] and may in some cases furnish a strong reason for seeking discovery in equity, instead of, or in addition to, the filing of interrogatories under the statute.

THE DUTY TO INVESTIGATE BEFORE ANSWERING.

An officer of a corporation must investigate, and the extent of his duty has been recently discussed by Chief Justice Holmes in the case of Robbins *v.* Brockton, etc., St. Ry.[3] as follows:

"The president stands in the place of the corporation, and the corporation, being reputed to have done whatever its servants did in the course of their employment, is supposed to know what they did, and therefore cannot shelter itself under a general profession of personal ignorance on the part of its president. . . . Of course the knowledge of the corporation is a fiction and therefore its obligation to answer is not to be pressed beyond what is reasonable. . . . But if in the case of an accident like the present the servants concerned are still in the employ of the company and within convenient reach, they must be inquired of concerning facts, which the plaintiff has a right to know. If the result of inquiry is to satisfy the president's mind as to any of the material facts or circumstances, he must answer interrogatories in proper form which call for them. . . .

---

[1] *Cf.*, however, Gunn *v.* N Y., N. H. & H. R. R., 171 Mass. at p. 421.

[2] See R. L., c. 203, § 13.

[3] 61 N. E. Rep. 265.

"But the right to interrogate is not a right to abridge the other party's right to try any fairly doubtful fact. . . . If the president can say with truth, after reasonable inquiry, that he is unable to ascertain what the facts are, an answer to that effect would be enough."

This is perhaps as definite a statement as can be made of the general rule. The application must be left to the good sense of the trial judge, subject to exception to his action on a particular question, as in any case involving the application of general rules. The reasons for requiring investigation apply as well to the case of an individual party as to that of a corporate officer, and this is recognized in the authorities.

The duty of the party interrogated being to make reasonable investigation, how is the question of reasonableness to be decided? It is obviously a question for the court, and the only way of bringing it fairly before the court is by affidavit, showing the details of search made and the facts relied on as the excuse from further search. The excuse, if valid, is part of the answer[1] and should be supported by oath as much as any other part of the answer.

In this connection it is important to remember that the process for discovery is a searching of the conscience of a party, and the requirement that a party shall inquire of his agents and answer on information and belief, is made necessary by the organization of business. It is necessarily inconvenient for a party to investigate; and as there is a natural tendency to economize in matters of conscience under such circumstances, the value of discovery to the party who seeks it, of course, depends largely on the moral standards of the person who is called upon to swear to the answers as well as on the skill and care (or lack of skill and care) of his attorney in drawing the answers.

If a party or officer will "say with truth after reasonable inquiry" whether or not he is able to ascertain the facts, his examination may be of more use to the interrogating party than even a cross-examination of the party or officer; for on cross-examination the personal knowledge of the witness would limit his answers. If matters have been skilfully planned in a large concern, the party or officer examined may have been kept in ignorance of the matters inquired into, and therefore a conscientious inquiry and answer to interrogatories by such person may elucidate matters which could not be reached by cross-examination. This fact makes

[1] Hobbs *v.* Stone, 5 Allen (Mass.) 109.

it especially important that the court should be informed as to the extent of the inquiry made.

DISCOVERY IN SUITS ON ASSIGNED CLAIMS.

The most doubtful question as to the duty to investigate arises in suits on assigned claims.

Revised Laws, Chapter 173, Section 4, provides that

"the assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defences and rights of counter-claim, recoupment, or set-off, to which the defendant would have been entitled had the action been brought in the name of the assignor."

In a suit brought under this section by an assignee who has slight knowledge or a short memory, there seems to be no way for a defendant to get discovery from the assignor, unless it can be done indirectly. The assignor not being a party of record does not come within the terms of Section 57, which give the right to interrogate "the adverse party."

The statute above quoted (Section 4) was passed in 1897,[1] and it is interesting to note that, forty-six years before, the commissioners on the Practice Act recommended a still broader provision for suits on assigned claims. The Act as reported by the commissioners contained the following sections:

"SECTION 3. The assignee of a contract not negotiable may sue in his own name, but without prejudice to any set-off or other defence which might have been made if the action had been in the name of the assignor, who in no case shall be called as a witness by the plaintiff, but may be called as a witness by the defendant, and may be examined on interrogatories by the defendant, as if the action were in the name of the assignor."[2]

"SECTION 117. When any assignor of a claim sued in the name of the assignee, shall neglect or refuse to obey any lawful order of the court, or any justice thereof, respecting any answer to any interrogatory, he may be attached as for a contempt, and proceeded with, as is provided by law, in case of witnesses guilty of contempt."

"SECTION 118. When any such assignor shall be examined upon interrogatories by the defendant, the plaintiff may also examine him upon any interrogatories pertinent to the subject of the action."

"SECTION 119. The answer of each party, an assignor for this purpose being deemed a party, may be read," etc.[3]

---

[1] St. 1897, c. 402. [2] Hall, Mass. Practice, 162. [3] Ibid. 197.

All these sections were stricken out by the Joint Legislative Committee and were not included in the final act. As a matter of policy, however, tested from the point of view of the court imposing reasonable conditions on litigants in order to expedite the administration of justice, these recommendations of the commissioners are entitled to great weight and may be considered as improvements on the present law which has suited the convenience of a plaintiff without protecting the defendant. Now, a plaintiff in a suit on an assigned claim has the advantage of ignorance over a defendant in the matter of discovery, unless the courts treat the present law as sufficiently elastic to obviate the evil. It seems possible to reach the assignor under the present law indirectly by requiring the plaintiff assignee in answering interrogatories to inquire of the assignor and to state the results of his inquiry. If a party can buy a claim, he may fairly be expected to buy his assignor's knowledge of the facts also. He could, it seems, bring a bill in equity against his assignor in aid of his suit.[1] Should it not be held that reasonable search by an assignee included and required full disclosure of what his assignor knew?[2]

It seems also that under the reasoning in Wright *v.* Dame, already discussed, a bill in equity for discovery might lie against the assignor in favor of the defendant in a suit on an assigned claim. The assignor is interested in the success of the suit. If he has received no value and the suit is brought for his benefit, then he will profit directly by the success of the suit. If he has received value he has profited, and if there is a good defence to the claim he will have profited unfairly at the expense of the defendant, unless the defence is proved. These seem to be strong reasons why the court should assist such a defendant, if he sees fit to go to the trouble and expense of filing a bill in equity against the assignor to obtain assistance in his defence. Moreover, the statute allowing suit in the assignee's name expresses the intention of preserving the rights of the defendant, and one of those rights was the right to seek discovery in equity. The objection to the course suggested is that the rule in Wright *v.* Dame has been regarded as an exception originated by Lord Talbot in Wyche *v.* Neal[3] on grounds of practical justice, the general principle being that one who is merely a witness against whom no relief is prayed cannot be made a party

[1] *Cf.* Day *v.* Drake, 3 Sim. 64. [2] *Cf.* Stern *v.* Filene, 14 Allen (Mass.) 9, 10, 12.

[3] 3 P. Wms. 311. *Cf.* on this whole topic Hare on Discovery (2d American ed.), part i. chap. ii. pp. 63–88.

to a bill merely for the purpose of discovery. In order to reach the assignor in equity, therefore, it might be necessary to frame a bill for relief rather than discovery.

In the second part of this article the following topics will be discussed: "The Right to Qualify Answers;" "The Use of Interrogatories at Trial;" "The Admissibility of Answers in Evidence;" "The Duty of the Court to Protect the Right of Privacy;" "The Penalty for Failure to Answer;" "The Power to Enforce Answer by Contempt Proceedings;" "Discovery in Equity;" "Can Interrogatories be Inserted in a Bill for Relief?" "Can a Party Get Discovery both by Bill and Statutory Process in the same Case?"

Frank W. Grinnell.

10 TREMONT ST., BOSTON, MASS.